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IN THE

Supreme Court of the United States

No. 363.

OCTOBER TERM, 1926.

JUAN POSADAS, JR., Collector of Internal Revenue,
VICENTE CARMONA, Insular Treasurer,
BEN F. WRIGHT, Insular Auditor, and
METROPOLITAN WATER DISTRICT,
Petitioners,

v.

CITY OF MANILA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENT.

The proceedings in this case were begun in the Supreme Court of the Philippine Islands, January 8,

1925, by the filing of a petition by the City of Manila praying an injunction and writ of mandamus. The defendants were the Insular Collector of Internal Revenue, the Insular Treasurer, the Insular Auditor, and the Metropolitan Water District. The injunction and writ of mandamus were granted as prayed in the petition. Thereupon the defendants filed in this court a petition for a writ of certiorari which was granted June 1, 1926.

STATEMENT OF FACTS

The City of Manila is a municipal corporation created by Chapter 60, Title X, of the Philippine Administrative Code, Act No. 2711.

Prior to 1919, the City had control of the administration and management of the water systems which supplied water for municipal and public purposes and for the use of the inhabitants of Manila. Those systems comprised the Carriedo system, taken over from the defunct "Ayuntamiento de Manila," and the new Montalban system built under the authority conferred by section 70 of the act of July 1, 1902, 32 Stat. 691, and act No. 1323 of the Philippine Commission, April 14, 1905. Paragraphs XII to XVII, inclusive, of the petition filed in the court below (R. 7-8). Having such control, as fiduciary of the Carriedo fund and owner of the Montalban system, the City enjoyed the benefit of the free use of water from both systems for the needs of its department offices, markets, and other municipal buildings, for sprinkling the streets, parks and gardens, for extinguishing fires, for public hydrants, and for other municipal purposes.

March 6, 1919, the Philippine Legislature enacted

Act No. 2832, creating a public corporation denominated the Metropolitan Water District. The area within which it operates includes the City of Manila and certain contiguous municipalities. Its powers, functions and duties, exercised by a board called the District Board, include among other things the construction, maintenance and operation of a water system for the purpose of supplying water to the inhabitants of the district and the fixing and collection of proper charges therefor. After the enactment of the act and the creation of the Metropolitan Water District the administration and management of the water systems formerly operated by the City of Manila were turned over to the Metropolitan Water District.

Immediately a dispute arose between the Water District and the City as to the construction of Section 9 of Act 2832, in that while the District contended that said section conveyed and transferred to it the dominion and ownership of the City's water system, the City maintained that under the Spanish text of said section, which should control, for the bill as well as the act were discussed and finally passed in the Spanish language, the dominion or ownership of the system was still vested in her, and the Act had only the effect of transferring to the District the possession and administration thereof. Wherefore the City contended that she was, as she had always been, entitled to the free use of water from the system.

Finally, the Water District went to the Insular Auditor, presumably being of opinion that he had authority to settle the dispute. The Insular Auditor assumed jurisdiction and decided the controversy in favor of the Metropolitan Water District, and for the purpose of enforcing his decision did, on January 9,

1922, direct the Collector of Internal Revenue (1) to cancel certain warrants drawn in favor of the City (then awaiting the Auditor's countersignature) representing the City's share of the internal revenue collections, and (2) to draw a warrant on the balance due the City *in favor of the Metropolitan Water District* "in settlement of part of the accounts of the latter against the City of Manila now long standing." The Collector of Internal Revenue complied and the warrant was accordingly drawn and the money paid to the Water District. Thereafter, and until November, 1924, the same course was pursued, the Auditor authorizing and directing the diversion and payment to the Metropolitan Water District of the money in the treasury due the City as its share of the internal revenue collections.

November 10, 1924, the City Attorney wrote a letter to the Collector of Internal Revenue again protesting that the diversion and payment to the Water District of the money due the City, without the consent of the City, was in violation of express provisions of law, and demanding that thenceforth all payments out of the internal revenue fund due the City of Manila be paid to the City of Manila (R. 18).

By virtue of an arrangement between the Insular Auditor and the Collector of Internal Revenue, and for the purpose of putting the present controversy to a judicial test, the latter official issued two warrants under date of December 9, 1924, and December 23, 1924, in favor of the City of Manila, instead of in favor of the District, covering the former's share in the internal revenue collections, which warrants in pursuance of the said agreement, were not countersigned by the Auditor (Par. 12, special defense, R. 27). Whereupon the Collector of Internal Revenue, on advice of the

Auditor, notified the City Attorney that within ten days from the date of his letter, January 5, 1925, he would draw warrants in favor of the Metropolitan Water District for the sums due the City out of the internal revenue collections for the fourth quarter of the year 1924 (R. 19).

Thereupon the petition for an injunction and writ of mandamus was filed (R. 1-16). A preliminary injunction was granted restraining the Insular Treasurer from paying any warrant issued by the Auditor or the Collector of Internal Revenue in favor of the Water District against the funds belonging to the City as its allotment of the internal revenue collections and the special assessments provided for in Act No. 3065 (R., 20-21). The defendants' demurrer to the petition was overruled (R., 23). They then filed a special defense (R., 24-27) to which the petitioner demurred (R., 44-51) and on that issue the case was finally heard on November 25, 1925 (R., 51).

December 21, 1925, the court rendered final judgment directing that the preliminary injunction be made permanent, that a writ of mandamus issue ordering the Collector of Internal Revenue to issue in favor of the City of Manila, and not the Metropolitan Water District, all the warrants which he ought to issue for the City's share of the internal revenue collections, and whatever other fiscal collections might be due the City, and ordering the Insular Auditor to countersign and approve any such check or warrant which the Collector of Internal Revenue should so issue in favor of the City of Manila (R., 51-77).

THE QUESTIONS OF LAW

It is clear that this case does not involve the merits of the controversy between the City of Manila and the Metropolitan Water District in respect of the City's liability to pay for water for municipal purposes.

The questions of law presented and the propositions on which the City of Manila relies are:

1. The City is entitled by express provisions of law to the payment of the quarterly allotments to it of the internal revenue collections.

2. The duty of the Collector of Internal Revenue to make such payments to the City is a ministerial duty.

3. The duty of the Auditor to countersign the warrants for the City's share in the internal revenue collection is likewise ministerial.

4. The Auditor's action in directing the diversion and payment to the Metropolitan Water District of the money in the treasury payable to the City as its share of the internal revenue collections, was without authority of law and amounted to a usurpation (1) of the judicial function in attempting to settle and decide a justiciable controversy between the City of Manila and the Metropolitan Water District, and (2) of the legislative function in attempting to take money out of the treasury for a purpose not authorized by the legislative authority.

5. The jurisdiction of this Honorable Court.

1. The Right of the City to the Internal Revenue Collections.

The right of the City of Manila to a 30% share of the internal revenue and special taxes collections is

plain, undisputed and conclusively determined by the following provisions of the Administrative Code and the provision of Sec. 3 of Act No. 3065.

"Sec. 490. *Disposition of internal revenue in general.*—Internal revenue collected under the laws of the Philippine Islands and not applied as hereinabove provided or otherwise specially disposed of by law shall accrue to the Insular Treasury and shall be available for the general purposes of the Government, with the exception of the amounts set apart by way of allotment under the next succeeding section.

"Sec. 491. *Allotments of internal revenue for special purposes.*—Of the internal revenue accruing to the Insular Treasury under the preceding section there shall be set apart ten per centum as a provincial allotment, ten per centum as a road and bridge allotment, and twenty per centum as a municipal allotment; but the amounts allotted to said several purposes during any year shall not be greater than the amount allotted for the same purposes during the fiscal year nineteen hundred and nine."

* * * *

"Sec. 494. *Apportionment and use of municipal allotment.*—The municipal allotment shall be for the benefit of the inhabitants of the Islands in the purview of their community requirements, being available for municipal or other use as hereinbelow provided.

* * * *

"Sec. 495. *Status of cities, townships, and other local governmental divisions.*—For purposes of the allotment of internal revenue, a chartered city, township, or other local governmental division

not constituting part of a municipality proper shall have the status of a municipality and shall be deemed to be included under the term 'municipality' as used in this chapter.

"The City of Manila shall receive the shares which it would receive if it were both a municipality and a regularly organized province, and for the purposes hereof shall be deemed to be both the one and the other."

Section 3 of Act No. 3065 reads:

"Sec. 3. Ten per centum of the tax collected under this Act shall be distributed among the provinces and municipalities in accordance with the provisions of section four hundred and ninety-six of the Administrative Code, five per centum accruing to the provinces and the other five to the municipalities."

2. The Duty of the Collector to Issue Warrants in Favor of the City.

That the duty devolved upon the Collector of Internal Revenue to issue warrants for quarterly payments of the City's allotment is purely ministerial, cannot be gainsaid. The law is clear and unambiguous in this respect.

Section 497 of the Administrative Code provides:

"Sec. 497. *Warrants for quarterly payment of allotments.*—The payment of the internal revenue allotments *shall* be made from the Insular Treasury quarterly, upon warrants drawn by the Collector of Internal Revenue."

3. The Duty of the Auditor to Countersign the Warrants in Question.

It is likewise a ministerial duty of the Insular Auditor to countersign such warrants, because all the conditions mentioned in *Wright* v. *Ynchausti,* No. 316, October Term, 1926, decided December 13, 1926, which make such countersigning a mere ministerial duty, are present in this case, in that:

(a) The Insular Auditor had no discretion to pass upon the merits of the claim for which such warrants would have been drawn. The right of the City to a portion of the internal revenue collected by the Collector is undisputable, clear and conclusively fixed by the hereinbefore quoted provisions of the Administrative Code.

(b) There being no dispute between the Bureau of Internal Revenue and the City of Manila as to the latter's claim to the internal revenue collection, the only function of the Insular Auditor is to determine whether warrants are drawn by the proper officer, and that the amount stated in them represent the correct share of the City. There is no question that the Collector of Internal Revenue is the proper officer to draw the warrants.

(Sec. 497 of Administrative Code, *supra.*)

(c) Such warrants are applicable to the revenue funds in the hands of the Collector of Internal Revenue by such express, plain and clear provisions of law as to leave no room for doubt as to its meaning.

(See Sec. 497 of the Administrative Code, *supra.*)

Section 621 (Chapter 26, the Accounting Law) provides:

> "Sec. 621. *Countersigning of warrants by Auditor.*—No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

When an appropriation is made by the legislative authority for a specific purpose the duty of the disbursing officer to make the payment involves no discretion, it being purely ministerial, and may be compelled by mandamus.

> *Smith* v. *Jackson*, 241 Fed. 747, 246 U. S. 388; *Parish* v. *MacVeagh*, 214 U. S. 124.

The cases cited are the leading cases. Other illustrations are found in *McCarl* v. *Cox*, 8 Fed. (2d) 669, *Loisel* v. *Mortimer*, 277 Fed. 882, *Hetfield* v. *Barber*, 2 Fed. (2d) 723, all salary cases; *Cortelyou* v. *United States*, 32 App. D. C. 20, to compel payment of money appropriated by Congress for a manuscript; *State Library* v. *Kenfield*, 55 Cal. 488, to compel drawing of a warrant on the state treasurer for money in the state treasury belonging to the State library fund; *Purifoy* v. *Andrews*, 101 Ala. 643, 16 Sou. 541, to compel the issuance of a warrant for a county's share in certain surpluses; *State Lunatic Asylum* v. *State Auditor*, 46 Mo. 326, to compel issuance of a warrant in favor of the State asylum in accordance with an appropriation act; *Campbell* v. *Steele*, 37 La. Ann. 353, to compel the issuance of a warrant for payment of a claim for which an appropriation had been made; *Houghton* v. *Auditor General*, 9 Mich. 141, to compel the issuance of a warrant for payment of a tax balance due a county.

The duty of the Insular Auditor to countersign the warrant, properly drawn by the officer authorized and directed to do so, for a specific purpose authorized and provided by law, is no less ministerial. *Wright* v. *Ynchausti & Co.*, decided December 13, 1926.

Although the subject matter and the applicable provisions of law are different, this case is in this essential respect like the case of *Wright, Auditor,* v. *Ynchausti & Co.*, decided December 13, 1926, in that here as there the Auditor has undertaken to assume jurisdiction of a matter governed by express provisions of law and to act according to his own judgment without regard to and in violation of such express provisions of law. In the *Ynchausti* case the law committed to the Collector of Customs the duty of determining the right of protestants to a refund of customs duties; notwithstanding the express provisions of law the Auditor in that case assumed jurisdiction and decided for himself that the customs duties in question should not be refunded. In the present case, the law provides that certain funds in the Insular Treasury shall be appropriated and allotted to the City of Manila and that the payment of such allotments shall be made quarterly upon warrants drawn by the Collector of Internal Revenue; notwithstanding those provisions of law, however, the Auditor refuses to countersign the warrants so drawn by the Collector of Internal Revenue and directs that other warrants be drawn in favor of an alleged creditor of the City, the Auditor having decided that the indebtedness claimed to be due is a liability of the City which should be paid.

In the *Ynchausti* case the Auditor's duty to countersign the warrant drawn by the Collector of Customs

was held to be ministerial, because the law expressly provided for the determination of the right to such customs refunds and the drawing of such warrants by the Collector of Customs. In the present case the Auditor's duty to countersign the warrants drawn by the Collector of Internal Revenue *in favor of the City* was no less ministerial, because the law expressly provided for the allotment of the funds in question to the City and the drawing of such warrants in favor of the City. If his duty, therefore, is ministerial he may be compelled by mandamus to perform it, as was held in the *Ynchausti* case.

In *Roberts, Treasurer,* v. *United States,* 176 U. S. 221, the Court said (pp. 229-231):

> "The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in *United States* v. *Black,* 128 U. S. 40, and upon the authority of that case the defendant claims that no mandamus can be issued against him.
>
> The writ was refused in the *Black* case, because, as the court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction and the effect which the latter acts had upon the former, all of which required the exercise of judgment to

such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus. The circumstances under which a party has a right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

This case comes within the exception stated in the *Black* case, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose

duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

Another mandamus case against the Secretary of the Treasury is that entitled *Cortelyou, Secretary of the Treasury*, v. *United States*, 32 App. D. C. 20, in which that officer was compelled to pay an amount of money appropriated by Congress for a manuscript.

Cases in which the writ of mandamus has been is-

sued against state comptrollers and auditors are galore. The following are a few of them: To compel audit of claim, *Fowler* vs. *Pierce*, 2 Cal. 165; *McDougal* v. *Bell*, 4 Cal. 177; to compel audit or rejection of certain claims against state, *Noyes* vs. *Sohmer*, 81 Misc. 522, 143 N. Y. Supp. 475; to compel certification of moneys received by attorney-general on account of taxes sued for, *San Mateo County* v. *Oullahan*, 69 Cal. 647; to compel distribution of certain school moneys, *State* v. *Staub*, 61 Conn. 553, 23 Atl. 924; to compel payment of sum alleged to be due for military services, *Compton* v. *Anderson*, 52 N. J. L. 150, 18 Atl. 584; to compel comptroller to give county officers the rate per centum upon taxable property in their respective counties necessary to make payment of interest on state bonds, *Morton v. Comptroller General*, 4 S. C. 430.

The petitioners herein contend that their action in this case is supported by that part of section 24 of the Organic Act of August 29, 1916, 39 Stat. 545, which provides that:

> "The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury."

In doing so they assume that the former auditors for the several departments and the comptroller of the Treasury (whose authority is now vested in the Comptroller General of the United States) would have had authority to do what the Insular Auditor and his co-petitioners have attempted in this case, namely, to divert a sum of money in the treasury allotted by law

to a municipality and cause it to be paid to an alleged creditor of the municipality. In this, they fall into error. No such authority has ever been assumed by the accounting officers of the United States in any case of record. There is no hint or suggestion of any such authority in section 236 of the Revised Statutes or in the Dockery Act of July 31, 1894, 28 Stat. 207, or in the act of May 21, 1920, 41 Stat. 613, or in the Budget and Accounting Act of June 10, 1921, 42 Stat. 24. Even the Kiess Bill, H. R. 16587, 69th Congress, 2nd session, which purported to increase and clarify the powers and duties of the Auditor for the Philippine Islands, contains no such grant of authority or suggestion of such power.

It is likewise a mistake to assume that in the United States the accounting officers, including the Comptroller General, are vested by law with power and authority to settle and decide controversies to which the United States may be a party without a resort to the courts. Whenever there are controverted questions of fact or law, the case is invariably finally decided in the courts. The decision of the Comptroller General is not conclusive and in no sense binding on the courts. As the Court of Claims said in *Real Estate Savings Bank* v. *United States*, 16 Ct. Cls. 335, 351:

> "A claimant against the United States is no more concluded by the refusal of the Comptroller to pass his account than a claimant against a corporation is concluded by the refusal of its officers to pay his demand."

And in denying the power of the Comptroller to determine the rights of the parties:

> "The Comptroller is merely an accounting officer, the agent of one only of the parties to claims against the government, the officer clothed with authority to determine whether the Treasurer shall be authorized to pay a demand in the form and under the circumstances in which it is presented to him, *and not an arbitrator to finally settle and determine the legal rights of both parties.*" (Italics ours.)

Whenever a claim is denied by the accounting officers, the claimant has a right to proceed in the Court of Claims under section 145 of the Judicial Code (United States Code, Title 28, Sec. 250), where he may have a full hearing on the facts and the law without regard to the adverse decision of the accounting officers. Likewise, whenever any claim or matter is pending in one of the executive departments which involves controverted questions of fact or law, the head of such department may transmit such claim to the Court of Claims where it may be heard by the court under rules and procedure fixed by the court. Sec. 148 Judicial Code (U. S. Code, Title 28, sec. 254).

4. The Auditor's Action in Intercepting and Diverting the City's Share in the Internal Revenue Collections Was a Glaring Usurpation of Judicial and Legislative Powers.

The City contends that the Auditor's action in deciding that the City is indebted to the Water District and in undertaking to enforce that supposed liability by directing the withholding of money in the treasury due the City as its share of the internal revenue collections, and the payment thereof to the Water Dis-

trict, is arbitrary and unwarranted and constitutes (a) a usurpation of the judicial function in attempting to settle and decide a justiciable controversy between the City of Manila and the Metropolitan Water District, and (b) usurpation of the legislative function in attempting to take money out of the treasury for a purpose not authorized by the legislative authority.

(a) The controversy between the City and the Water District is a question of liability. It is not a matter of adjustment of accounts. There are no accounts between the City and the Water District. The sole question is a question of *law*, whether the City is entitled to the free use of water from the systems taken over by the Water District. If its right is established, there is no liability for the charges made by the Water District. If its right is not established, it is clearly indebted to the Water District for the water furnished and may be sued if it does not pay. The controversy has no resemblance to an accounting adjustment over which the Auditor would have jurisdiction under section 584 of the Administrative Code. The controversy is peculiarly one which can only be settled satisfactorily by judicial process. Among other defenses to the claim of the Water District, the City contends that any title which the Water District may now have in and to the water systems is held by the Water District *in trust* for the use and benefit of the City. It is an equitable defense on which the City has a right to be heard. The courts of law and equity are established for the purpose of hearing and deciding such questions. Under their respective charters both the City of Manila and the Metropolitan Water District can sue and be sued. If the Water District has a valid claim

against the City, that fact can be ascertained and determined in a judicial proceeding. If, as the City contends, the Water District holds the title to the water systems in trust for the use and benefit of the City, that can also be determined in the same maner and in the same proceedings.

That the accounting officers, including the Insular Auditor, cannot assume jurisdiction to decide such matters, is illustrated by the case of *Smith* v. *Jackson*, 241 Fed. 747, 246 U. S. 388. In that case the Auditor for the Canal Zone withheld payment of a judge's salary on the ground that the judge was indebted to the United States, the indebtedness being determined not by the judgment of any court but simply by the finding of the Auditor. To quote from the opinion of the trial court, 241 Fed. 774:

> "The indebtedness is denied by Judge Jackson. He denies it upon the grounds that there was no law or regulation under which the indebtedness was or could have been created. He denies that the respondent has authority to withhold any part of his pay in the collection of an alleged but disputed indebtedness. And yet the executive officer has sat as a court, and, without evidence or hearing, except what he considered evidence, and except what he considered a hearing, decided a controversy that he created by his own action. He has passed upon a disputed claim which is a disputed claim merely because he has created the dispute in refusing to make payment where it was his plain duty to make such payment. His conduct, however good his intention may have been, hardly falls short of being shocking to the judicial sense of justice, proper and orderly procedure, in a matter that is clearly justiciable."

The controversy in this case is "clearly justiciable" and should have been so recognized by the Insular Auditor, especially in view of section 650 of the Administrative Code, with which the Auditor is doubtless familiar, which provides:

> "Sec. 650. *Collection of indebtedness adjudicated by Auditor.*—The Insular Auditor shall, through the proper channels, supervise and procure the collection and enforcement of all debts and claims, and the restitution of all funds and property, found to be due the Government in his settlement and adjustment of accounts; *and if any legal proceeding is necessary to such end, he shall request the Governor-General to authorize and direct the institution of the same.* * * *" (Italics ours.)

There is nothing in the Act of August 29, 1916, 39 Stat. 545, from which the Auditor derives his powers, which warrants the course of action attempted by the Auditor in this case, and much less, that for the purpose of enforcing an alleged settlement, he can take money payable to a municipality and dispose of it in favor of its alleged creditor. As the Supreme Court of the Philippine Islands said in its opinion in this case: "No authority has been cited, and none will ever be found to legalize such a proceeding." (R. 73). On this decisive point, Justice Street, who concurred in the result although not agreeing with all that was said in the majority opinion, said:

> "The Insular Auditor certainly does not have the power to put his hands into the city treasury and take out money to pay its debts however meritorious the obligation; and if he does not have this power he cannot intercept and divert funds in course of transmission to the city."

(c) That the Auditor has undertaken to withdraw and divert money in the treasury to the credit of the City, without any legislative authority whatever and over the protest of the City, is so plain from all that has already been said that it seems unnecessary to argue at length his invasion of the legislative field of appropriation. Neither the Auditor nor any other person has any authority to withdraw or divert money from the treasury for any purpose "except in pursuance of an appropriation by law." (Act of August 29, 1916, 39 Stat. 545, 547). As this court has said, in *Reeside* v. *Walker*, 11 How. 272, 291.

> "However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion."

There is nothing in section 24 of the Act of August 29, 1916, 39 Stat. 545, which gives to the Auditor any legislative power of appropriation. There is nothing in section 588 of the Administrative Code, as amended by Act No. 3066, which gives him that power *except the words "enforce the settlement of accounts"* which he interprets as giving him the power to do what he has attempted to do in this case. On those words alone rests the whole argument that he has such power to stop the payment of public money in the public treasury to the credit of the City of Manila and arbitrarily to make an appropriation of that money to pay an alleged debt—not founded on the judgment of any court, but simply on the finding of the Auditor himself that the claim on such alleged indebtedness is "just, legal and proper."

The Organic Law, the Act of August 29, 1916, ch. 416, 39 Stat. 545, provides:

> "That no money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *
>
> "That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only."

The City's share of the internal revenue collections is a share in public money assessed and collected for governmental purposes. In so far as the City is concerned, its share of that money is assessed and collected for a specific purpose. Under the law it may be paid out for such purpose only. To withdraw it or divert it for any other purpose (as here, for example, to pay an alleged debt due from the City to a public corporation, notwithstanding the objection and protest of the City) is contrary to the express provisions of the Organic Law. Such a withdrawal and diversion is also in violation of section 600 of the Philippine Administrative Code, 1917, which provides:

> "Sec. 600. *Use of appropriated funds.*—All moneys appropriated for the various branches of the public service shall be available solely for the specific purposes for which appropriated, and for no others. Moneys appropriated for salaries and wages shall not be available for contingent expenses or vice versa."

There is no contention by the petitioners herein that any appropriation has ever been made to pay the alleged debt of the City to the Metropolitan Water District, or even that there has been any adjudication

of the asserted legal liability other than the decision and action of the Auditor complained of in this proceeding.

The fact that the City may owe a debt to the Metropolitan Water District (assuming only for the argument that it does owe such a debt) does not give to the creditor, or to the Insular Auditor acting in the interest of the creditor, any right to appropriate the money in the Insular treasury to pay that debt. *Reeside* v. *Walker,* 11 How. 272.

It is a novel doctrine that money in the treasury may be garnisheed by a creditor of government. Even more novel and striking is the attempt made in this case not only to garnishee the money in the treasury to the credit of the City, for the payment of the alleged debt due from the City to the Water District, but also *to establish the liability* without any judicial trial or hearing and over the protest of the City, simply by the finding of the Auditor that the liability existed and that the claim was "just, legal and proper."

The right of the City to the money in the treasury allotted to it by law is absolute and cannot be taken away by any other than the local legislature or the Municipal Board (Sec. 2442, Ad. Code) which has control over the appropriation of public money. The provisions of law are plain and cannot be evaded by interpretations of the law creating the accounting officers and by historical arguments as to the powers of those officers. In this respect this case is similar to *Wright* v. *Ynchausti & Co.,* decided December 13, 1926, in which it was held by this court, affirming the Supreme Court of the Philippine Islands, that the general powers of the Insular Auditor over accounting matters and to determine the availibility of an appro-

priation for the payment of public money, did not warrant his interference with the refunding of customs duties which was governed by specific provisions of law.

5. The Jurisdiction of this Honorable Court.

It is vigorously contended by the petitioners that neither the Supreme Court of the Philippine Islands nor this Honorable Court has jurisdiction over the subject of this controversy, the matter being one falling within the exclusive jurisdiction of the Chief Executive of the Philippine Islands through an appeal which the respondent should have taken from the decision of the Auditor in ordering the Collector of Internal Revenue to issue warrants for the City's share in the internal revenue allotment in favor of the Metropolitan Water District.

It is respectfully submitted that such action of the Auditor was not a proper subject for appeal to the Governor General.

(a) *The settlement made by the Auditor in this case was suspended.*

In the first place, paragraph 11 of the special defense in the answer (R. 27) admits the allegation contained in paragraph VI of the petition, i. e., that the Auditor instructed the Collector of Internal Revenue that warrants covering the internal revenue collections allotted to the City be drawn in favor of the District instead of said City.

Paragraph IV of the petition alleges that from and after January, 1922, (R. 4-5) the Collector of Internal Revenue had been drawing such warrants to the District. Paragraph VII (R. 5-6) alleges that the City

requested the Collector to stop such payments to the District.

Paragraph 12 of the special defense (R. 27) impliedly admits the above facts, for it alleges that "for the purpose of putting the present question to a test," both the Insular Auditor and the Collector of Internal Revenue agreed to issue, and the Collector issued in fact, two warrants in favor of the City of Manila instead of the Metropolitan Water District, and the Auditor refused to countersign said two warrants and returned them unsigned to the Collector.

So, the enforcement of the alleged settlement of accounts made by the Auditor from 1922, which might have been the subject of an appeal to the Governor General on the part of the City—although that would be very doubtful, for it is the very settlement and not the *enforcement* thereof which is appealable—, was suspended by the drawing of the warrants for the last quarter of 1924 in favor of the *City* instead of the District, as had been done since January, 1922, owing to the protest filed by the City against such previous payments to the District. The drawing of such warrants in favor of the City was not appealable to the Governor-General for it was in conformity to the City's desire. On the other hand, the refusal of the Auditor to countersign such warrants was not a decision of the same kind as those that may be appealed to the Governor-General. Such refusal to countersign was NOT evidently a SETTLEMENT OF ACCOUNTS or anything like, but a mere non-compliance with a ministerial duty by the Auditor. Moreover, petitioners plainly avowed that such refusal was only "for the purpose of putting the present question to a test," which clearly means that petitioners herein wanted the City to take

the case to the court. The Collector of Internal Revenue in his letter Exhibit "C" (R. 19-20), in which he threatened to substitute for the uncountersigned **warrants other warrants** to be issued payable to the District after ten days from the date of said letter, made this statement: "This information is given so that, if desired, the City of Manila may institute any JUDICIAL ACTION it may deem proper and expedient."

It thus appears that the petitioners impliedly admitted that the action taken by them was not one requiring an appeal to the Governor-General, but rather the institution of court proceedings.

(b) *An appeal to the Governor-General was not a proper, speedy or adequate remedy.*

Supposing, however, that the City could have appealed to the Governor-General from such refusal to countersign the warrants, such appeal would not have been a proper, speedy and adequate remedy. The case could not, from the nature of things, be decided by the Governor-General in ten days, and furthermore, the Governor-General is not required or empowered by any provision of law to take any action similar to the issuance by a court of a writ of injunction, so that the rights of the City could not have been properly protected by its resorting to an appeal to the Governor-General, even admitting that the action of the petitioners was appealable.

(c) *Action of the Auditor in this case was not a decision.*

But again we respectfully submit that the City was not in duty bound to appeal to the Governor-General from the action of the Auditor in refusing to countersign the warrants in question. Under the provisions of Sec. 25 of the Jones Law, an appeal may be taken by any aggrieved person from any "action or decision of the Auditor in the SETTLEMENT OF HIS ACCOUNT OR CLAIM." The claim of the City was already SETTLED and DECIDED by the Auditor prior to 1922. In other words, when he gave his said order to the Collector of Internal Revenue the City's claim was already SETTLED. Such order was not a SETTLEMENT but the ENFORCEMENT of a settlement already made. It is so considered by the Auditor himself for in taking such action he invoked Sec. 588 of the Administrative Code which deals with the enforcement of settlements made by the Auditor.

None of the provisions of Sec. 24 of the Jones Law, however, warrants the Auditor's action. Such section does not provide how a settlement of accounts shall be enforced by the Auditor, and much less that for the purpose of enforcing such settlement he can take money payable to a person and dispose of it in favor of his alleged creditor.

Sec. 588 of the Administrative Code empowers the Auditor to authorize and enforce his settlements of accounts between bureaus and offices or between local governments. It does not, however, prescribe how such enforcement shall be effected. No other provision of law authorizes the method of enforcement which the Auditor attempted to adopt in the instant case. Moreover, a subsequent section in the Administrative Code (Sec. 650) is in fact a limitation on the Auditor's power to enforce his settlements of accounts granted by Sec. 588, because said Sec. 650 provides that the

collection and enforcement of debts and claims shall only be SUPERVISED and PROCURED by the Auditor THROUGH PROPER CHANNELS. The section further provides that if any LEGAL PROCEEDING be necessary to such end, that is, where the debtor refuses to pay or restitute funds due the Government, then the Auditor shall request the Governor-General to authorize the institution of such proceedings.

Court action on the part of the Water District would have been welcomed by the City. Its liability would have thus been determined by men learned in the law and of reputed experience and impartiality. It would have thus been in a position to raise the major questions of its ownership and rights in and to the water supply system and of the constitutionality of Act No. 2832 creating the District upon which the Auditor based his decision prior to 1922. Obviously the determination of the constitutionality of a law is beyond the powers of the Auditor. This explains the stubborness of the City in refusing to abide by the decision and settlement of the Auditor.

(d) *The action of the Auditor in this case is not a decision within the meaning of the Jones Law; but even assuming, for the sake of argument, that it was, such decision is not binding upon the courts.*

The action of the Auditor in attempting to dispose of the City's allotment of the internal revenue collections is not a decision. There were no contradictory or opposing claims to such allotment. The Metropolitan Water District never claimed to be entitled to it.

But assuming, for the sake of the argument, that

such action was a decision, such decision is not conclusive upon the judicial branch of the Government. *Smith* v. *Jackson,* 246 U. S. 388; *Real Estate Savings Bank* v. *United States,* 16 Ct. Cls. 335; *United States* v. *Harmon,* 147 U. S. 268; *Longwill* v. *United States,* 17 Ct. Cls. 288; 15 Opinions Atty. Gen. 192.

The fact that an Appropriation Act directs the payment of such claims as "may be certified to be due by the accounting officers" does not vest in them exclusive jurisdiction. They simply act in their usual capacity of auditing officers, leaving the claimant, unimpaired, a judicial remedy, *Sowle* v. *United States,* 38 Ct. Cl. 525.

(e) *Neither the City nor the Metropolitan District is an Executive branch of Government.*

But the City of Manila is clearly not an executive branch of the government. The executive branch of the Philippine Government is composed of the Chief Executive and the Executive Departments (Chapters 4 and 5, Title II, Administrative Code). The City of Manila is a political body corporate created by the Philippine Legislature for the administration of the City's affairs. (Ch. 60, Title X, Administrative Code). It is not a dependency or subdivision of any executive department, although in a few administrative matters it must obtain the sanction or approval of the Secretary of the Interior (Ibid). In fact the City does not perform any duty or exercise any function, by delegation or otherwise, belonging to the executive power of the government. In many aspects its interests are opposed to those of the central government. The Philippine Reports contain numerous cases between the City and the Philippine Government (See Sec. 2, Administrative Code).

In paragraph I of the petition it is alleged that the City is a municipal corporation created by the Legislature, and is empowered to sue and be sued. In paragraph II of the same petition it is averred that the District is a public corporation with powers to sue and be sued. No one of the executive branches of the Government is given by law this power to sue and be sued. Therefore, neither the City nor the District is an executive branch of the Government.

CONCLUSION.

We have studied carefully and painstakingly not only the facts presented in the record and the applicable statutes, but also every case cited in the two briefs filed in behalf of the petitioners. We have been unable to find one case which supports the extraordinary position taken by the Insular Auditor and the broad powers claimed for him under section 24 of the Organic Act of 1916. On the question whether an officer of the government may be compelled by a writ of mandamus to do a certain act, cases may be cited on either side. It is well settled, on the one hand, that mandamus will issue to compel an officer to perform a purely ministerial duty, and on the other hand that it will not issue to compel or control the performance of a duty in the discharge of which he has any lawful discretion. As this court has said (*Work v. Rives*, 267 U. S. 175), the cases range from the wide discretion in some instances vested in the executive officers in the construction of the statute to be executed, to cases where the duty is so obviously ministerial that the officer can do only one thing. Thus *Kendall v. United States*, 12 Peters, 524, is an early leading case of the latter class, and on the other side *Decatur v. Pauld-*

ing, 14 Pet. 497, is an example of the first class. "Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall* case and less than in the *Decatur* case, and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the Congressional purpose." *Work v. Rives*, 267 U. S. 175.

So in this case, we are confronted with the question whether the duties imposed upon the petitioners here, the Collector of Internal Revenue and the Auditor, with respect to the payment to the City of Manila of its share of the money in the treasury allotted to it by law out of the internal revenue collections, involved the exercise of any judicial or quasi-judicial discretion, or whether those duties were not purely ministerial. It seems so clear, in view of the express provisions of law setting aside the fund in question for the City and directing the drawing of warrants in favor of the City (sections 490-497 of the Administrative Code), that those duties were purely ministerial, and so equally clear that the duty and power of the Auditor under section 24 of the Organic Act of 1916 and section 588 of the Administrative Code did not extend to the extraordinary length contended for by him, that is, to a determination of the legal liability of the City to the Water District and to an "enforcement" of that liability by literally taking from the treasury the money allotted to and due the city,—that argument is unnecessary. This case unavoidably falls within the class of cases of which *Kendall v. United States*, 12 Pet. 524, is the leading case, in that the duties of the defendant officers were purely ministerial and their performance properly compelled by mandamus.

In the last brief filed in behalf of the petitioners it is argued and practically assumed that on the merits the claim of the Water District against the City is incontrovertible and has been settled and decided not only by the Auditor, whose jurisdiction we challenge, but also by the Philippine Legislature and by the Governor General (Petitioners' brief on the merits, Points IV and V, pp. 6-9), and that therefore the result attained being correct and desirable, the court was not justified in interfering, however wrong the petitioners may have been in doing what they did and in refusing to do what they should have done.

As we have already pointed out, and as is obvious from the nature of the case, the case now before the court does not involve the merits of the controversy between the City of Manila and the Water District. The proceeding is one in which the relief sought is an injunction and a writ of mandamus and the only questions involved are the questions as to the power and authority of the government officers whose acts are challenged and the performance of whose ministerial duties is sought to be compelled. We take this occasion, however, as the question is raised by the petitioners, to say that the City here as well as in the court below would welcome the opportunity to present its case on the merits, an opportunity it has never yet had. The controversy is a justiciable controversy. The City denies that it has ever had any hearing on the merits, that it has ever had its day in court, and assures this Court that it has reasonable grounds, both legal and equitable, on which to contest the asserted liability, (1) in that it contends that section 9 of Act No. 2832, on the construction of which the question of the title to the water system depends,

was erroneously translated from the original Spanish text and therefore that the construction placed upon the act by the Water District and the petitioners is founded on error, and (2) that assuming that Act No. 2832 is correctly construed as contended for by the Water District and the petitioners, it is unconstitutional and invalid in that it deprives the City of its *corporate* property without compensation and without due process of law. On those justiciable questions the City is entitled to be heard and is not bound to accept or be subjected to the arbitrary action of the Insular Auditor.

Wherefore the respondent respectfully prays that the decision of the Supreme Court of the Philippine Islands be affirmed with costs.

Respectfully submitted,

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